

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002225-MR

CITY OF RADCLIFF

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 97-CI-01239

HARDIN COUNTY WATER DISTRICT NO. 2

APPELLEE

OPINION

AFFIRMING

★ ★ ★ ★ ★

BEFORE: HUDDLESTON, McANULTY, AND MILLER, JUDGES.

MILLER, JUDGE. City of Radcliff brings this appeal from an order of the Hardin Circuit Court entered August 20, 1998. We affirm.

The question presented is whether the City of Radcliff (the City) may impose a franchise tax upon Hardin County Water District No. 2 (the district), a utility financed with federal funds provided by the Farmers Home Association (FmHA) and serving an area at the time of annexation by the City. The City attempted to impose the tax under Ky. Const. §163 requiring public utilities to obtain permission from municipal authorities for construction along, over, or under city streets or right of

ways. The circuit court held that to permit the franchise tax, which would be passed on to the district's customers, would be in violation of 7 U.S.C. §1926(b), a provision of the Consolidated Farm and Rural Development Act (1961). 7 U.S.C. §1926(b) provides as follows:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; **nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.** (Emphasis added.)

The circuit court, we think, properly predicated its opinion upon City of Madison v. Bear Creek Water Association, Inc., 816 F.2d 1057 (5th Cir. 1987). Therein the City of Madison had sought to condemn a water association's facilities. In rejecting the City's effort to condemn, the federal court interpreted the statute as prohibiting "any curtailment or limitation of an FmHA-Indebted Water Association's Services resulting from municipal annexation or inclusion." Id. at 1059. We are of the opinion that to allow the City of Radcliff to impose a franchise tax upon the district during its indebtedness to FmHA would have the same effect as curtailing or limiting services. It would effectively lessen the ability of customers of the district to retire federal indebtedness. Moreover, it directly offends the statute in allowing imposition of a franchise as a condition for continuing

to serve the area served by the district. For that reason, we think the imposition of the franchise tax is offensive to the federal statute. Of course, federal law is supreme. U. S. Const. art. VII. Recognizing this supremacy, we must conclude that Congress, in enacting §1926(b), intended to prevent local governments from directly or indirectly impairing a federally financed district's ability to retire its indebtedness. The franchise tax to be passed on to the consumer--the sole source of funds for bond retirement--is the sort of impairment Congress intended to avoid.

The City directs our attention to City of Florence v. Owen Electric Cooperative, Inc., Ky., 832 S.W.2d 876 (1992), City of Nicholasville v. Blue Grass Rural Electric Cooperative Corporation, Ky., 514 S.W.2d 414 (1974), and City of Flemingsburg v. Public Service Commission, Ky., 411 S.W.2d 920 (1966)--all announcing the principle that §163 of the Kentucky Constitution gives to cities the right to control the use of their streets, including the use of the streets by utilities serving newly annexed territory. We do not, however, consider these authorities dispositive as none of them pitted the federal statute (7 U.S.C. § 1926(b)) against the right of a city to levy a franchise tax upon newly incorporated territory already subject to utility service financed by federal funds.

In sum, we are of the opinion a city may not require a franchise of a water district serving a newly annexed territory unless and until any federal financing of the district has been satisfied or otherwise removed.

For the foregoing reasons, the order of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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